APPENDIX A

OCTOBER 2, 1996
JOINT POSITION STATEMENT OF

MFS INTELENET, INC.,

AND

US WEST COMMUNICATIONS, INC.

ON NEGOTIATED TERMS TO BE INCLUDED IN AN ARBITRATED INTERCONNECTION AGREEMENT

FOR THE STATE OF WASHINGTON

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XXXI. UNBUNDLED ACCESS/ELEMENTS

A. General Terms

1. USWC agrees to provide the following unbundled network elements which are addressed in more detail in later sections of this agreement: 1) local loop, 2) local and tandem switches (including all vertical switching features provided by such switches), 3) interoffice transmission facilities, 4) network interface devices, 5) signaling and call-related database facilities, 6) operations support systems functions, and 7) operator and directory assistance facilities.

USWC Proposed Paragraph:

2. **This Agreement provides for the provision of Unbundled Loops to MFS which may be connected with MFS's switch for the purpose of offering a finished retail service. In addition, USWC agrees to provide an Unbundled Switching Element to MFS pursuant to the NIUER Process which may be combined with MFS-provided loops to provide a finished retail service. USWC will not combine USWC's Unbundled Loops with USWC's Unbundled Switching Element to provide a finished service to MFS. USWC agrees, however, to offer finished retail services to MFS for resale pursuant to Section XXX, Resale, of this Agreement.**

MFS opposes the inclusion of the above paragraph in this Agreement.

3. USWC will not restrict the types of telecommunications services MFS may offer through unbundled elements, nor will it restrict MFS from combining elements with any technically compatible equipment the MFS owns. USWC will provide MFS with all of the functionalities of a particular element, so that MFS can provide any telecommunications services that can be offered by means of the element. USWC agrees to perform and MFS agrees to pay for the functions necessary to combine requested elements in any technically feasible manner either with other elements from USWC's network, or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically

combined.

B. Description of Unbundled Elements

1. Tandem Switching

USWC will provide a tandem switching element on an unbundled basis. The tandem switch element includes the facilities connecting the trunk distribution frames to the switch, and all the functions of the switch itself, including those facilities that establish a temporary transmission path between two other switches. The definition of the tandem switching

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APPENDIX B

98-35146

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

U S WEST COMMUNICATIONS, INC.,

Plaintiff/Appellant,

v.

MFS INTELENET, INC., et al.,

Defendants/Appellees.

On Appeal From United States District Court
for the Western District of Washington
No. C97-222WD

BRIEF OF APPELLEE MFS INTELENET, INC.

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C. *USWC's Statutory Obligations*

1. Combinations of network elements

Under Section 251(c)(3), a requesting carrier, such as MFS, may achieve the capability to provide telecommunications services completely through access to the unbundled network elements of an ILEC, such as USWC. *Iowa Utils. Bd.*, 120 F.3d at 814. Contrary to USWC's assertion (USWC Brief at 18), there is no mandate in the Act that requires CLECs to combine ILEC unbundled elements they purchase for themselves. While according to the Eighth Circuit's decision a state commission may not impose a rebundling obligation on an ILEC, 120 F.3d at 813, nothing prevents an ILEC from voluntarily agreeing to combine elements for a requesting carrier. In fact, the structure of the Act reveals Congress' preference for such voluntary agreement. *Id.* at 801. Thus a requesting carrier and an ILEC may mutally agree that the ILEC will combine unbundled network elements for the CLEC.

MFS and USWC negotiated numerous provisions in their interconnection agreement and requested that the WUTC arbitrate only certain issues that were not resolved by negotiation. R 1769, 1897-98; ER 24, 31-32. One such provision

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voluntarily agreed to by the parties is the following section

concerning the combination of network elements:

> USWC agrees to perform and *MFS agrees to pay for the functions necessary to combine requested elements* in any technically feasible manner either with other elements from USWC's network or with elements possessed by MFS. However, USWC need not combine network elements in any manner requested if not technically feasible, but must combine elements ordinarily combined in its network in the manner they are typically combined.

R 2631; ER 45 (emphasis added).

Under the Act, the WUTC is limited to resolving disputed issues in its role as arbitrator. 47 U.S.C. §§ 252(b)(4)(B) and (C), § 252(c); *TCG Milwaukee*, 980 F. Supp. at 999. Since the above-quoted language was not disputed, the WUTC did not impose or "levy" a rebundling obligation on USWC. MFS and USWC resolved this issue on their own and included this negotiated item in the interconnection agreement they subsequently submitted to the WUTC for approval. This Court should not permit USWC to go back on its bargain.

Realizing that basing its combination claim on the combination provision would undermine the Act's preference for voluntarily negotiation, and acknowledging that this language was not submitted to the Arbitrator for consideration, USWC now argues

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that the Arbitrator rejected the following disputed language, which USWC characterizes as "an important limitation" on its

duty to combine network elements for MFS: "USWC will not combine USWC's Unbundled loops with USWC's Unbundled Switching Element to provide a finished service to MFS." R 1843; ER 30.

During the arbitration, USWC consistently argued that the disputed language was necessary to prevent MFS from offering a finished telecommunications service based upon a combination of network elements. R 2764; ER 60. USWC conceded in briefing before the Court below that this argument has been foreclosed by *Iowa Utils. Bd.*, 120 F.3d at 814-15; CR 85 at 28 (USWC Opposition at 28).

USWC now argues that the disputed language provided a "critical limitation" on the negotiated combination provision.[15] USWC Brief at 18. Simply put, this issue is a red herring, meant to distract the Court from USWC's voluntary agreement to a negotiated provision that it now wishes it had not negotiated. If USWC was unwilling

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[15] USWC also argues that the Agreement does not "explicitly" provide for a recombination fee. USWC Brief at 18. However, as USWC itself admits, in a footnote, the Agreement does provide for a recombination fee to be assessed by USWC. *Id.* at 18 n.4. Although no dollar amount is specified for this fee, the Network Interconnection and Unbundled Element Request process provides a method by which MFS may request, and USWC may propose a fee for, specific combinations of network elements. R 2622-23; ER 42-43.

APPENDIX C

98-35146

IN THE

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REPLY BRIEF OF APPELLANT

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> BellSouth first argues that this issue cannot be reached in this court because MCI did not object to this provision of the NCUC's order when it was proposed. MCI disputes this contention, arguing that [the Act] itself allows parties aggrieved by any section of the Agreement to appeal to [federal district] court. 47 U.S.C. § 252(e)(6). The court agrees, and will address this issue on the merits. To hold otherwise would be to rely on an exhaustion of state remedies argument which does not seem to apply here, where Congress has devised an entirely new scheme.

MCI Telecomm. Corp. v. BellSouth Telecomm., Inc., 1998 U.S. Dist. LEXIS 8303 at *13 (E.D.N.C. May 22, 1998).[5]

In addition, this Court should hear this issue on appeal because it presents a question of legal interpretation of the Act, which the Court would in any case review *de novo*, and any relevant facts are clearly set forth in the record. *See Atchison, Topeka & Santa Fe Rwy. Co. v. Brown & Bryant, Inc.*, 132 F.3d 1295, 1299 n.2 (9th Cir. 1997); *Columbia Steel Casting Co., Inc. v. Portland General Elec. Co.*, 111 F.3d 1427, 1442-43 (9th Cir. 1997); *United States v. Thornburg*, 82 F.3d 886, 890 (9th Cir. 1996).

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[5] MCI and MFS (now WorldCom Technologies, Inc.) have signed a merger agreement. *See* MFS Br. at Corporate Disclosure Statement. Thus, MCI/MFS (WorldCom) is now arguing a position to this Court that is directly contrary to the argument it made, and won, in the Eastern District North Carolina.

MFS and the WUTC also claim that US West cannot challenge the combination provision because US West agreed to it. While US West was willing at the time of the arbitration to combine some elements for MFS, if paid for this service, this was premised on MFS not thereby obtaining finished services at cost-based rates rather than resale prices. See Joint Position Statement at 73, MFS

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ER 30. The arbitrator rejected U S WEST's proposed limitation, and MFS struck the limiting clause from the Agreement based on the arbitration order. *See* Agreement at 71 (XXXI.A.3), USWC ER 55. Thus, U S WEST did not "agree" to the current contract provisions on unbundling and combination of elements.

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